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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DAVID K. GOTTLIEB, as Trustee in Bankruptcy, etc., et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

JOSEPH FAHS et al.,

Defendants, Cross-complainants and Respondents.

B218087

(Los Angeles County Super. Ct. No. BC375824)

APPEALS from judgments and orders of the Superior Court of Los Angeles County. Elizabeth A. White, Judge. Affirmed as modified, subject to respondents' consent.

Hill, Farrer & Burrill, Dean E. Dennis, Daniel J. McCarthy, Paul M. Porter; Law Offices of Michael E. Reznick, Michael E. Reznick for Cross-defendant and Appellant Beverly Wilshire Properties, Inc.

Drinker Biddle & Reath, George T. Caplan, Paul M. Gelb; Pachulski Stang Ziehl & Jones, Jeremy V. Richards, Ellen M. Bender for David K. Gottlieb, as Trustee in Bankruptcy, for Plaintiff, Cross-defendant and Appellant Georges Marciano.

Law Offices of Alain V. Bonavida, Alain V. Bonavida; Michael J. Partos, Cozen O'Connor; Ferguson Case Orr Paterson, Wendy C. Lascher for Defendants, Cross-complainants and Respondents Steven Chapnick, Joseph Fahs and Elizabeth Tagle.

Reed Smith, Margaret M. Grignon, Anne M. Grignon; R. Rex Parris Law Firm, R. Rex Parris, Alexander R. Wheeler; Wheeler & Sheehan, David C. Wheeler for Defendants, Cross-complainants and Respondents Camille Abat and Miriam Choi.

Appellant Georges Marciano appeals from judgments and orders in favor of respondents Camille Abat, Steven Chapnick, Miriam Choi, Joseph Fahs, and Elizabeth Tagle.[1] Marciano accused respondents of stealing vast sums of money and valuables. He inflicted emotional distress on each of them by repeatedly sending outrageous and defamatory letters and e-mails threatening, among other things, to have them thrown in jail.

After audits and police investigations initiated by Marciano found no wrongdoing on the part of respondents, Marciano sued them, at times alleging that they collectively stole $413 million. Respondents cross-complained for defamation and intentional infliction of emotional distress.

The trial court imposed terminating sanctions against Marciano for discovery abuse, first dismissing his complaint against respondents, and then striking his answers to respondents' cross-complaints. Following entry of default and a prove-up hearing establishing liability, the trial court empanelled an advisory jury for the purpose of determining damages. The advisory jury rendered verdicts awarding each respondent $69,044,000 in compensatory damages and $5 million in punitive damages. While the trial court indicated that it found the advisory verdicts justified, the final judgments entered by the court awarded lesser amounts of damages, so as to conform with each respondent's previously served statement of damages. Still, the final judgments awarded extremely large sums of damages against Marciano, ranging from $15.3 million to $55 million.

On appeal, Marciano makes two primary arguments: (1) that the trial court abused its discretion by imposing terminating sanctions, and (2) that the damages awarded were

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[1] On May 20, 2011, this Court granted the application of David K. Gottlieb, trustee in the Chapter 11 bankruptcy case of Georges Marciano, to be substituted in this matter in place of Georges Marciano. To avoid confusion, the appellant is generally referred to as "Marciano" in this appeal.

excessive.[2] We find that the terminating sanctions orders were proper. However, we also find that, on the record presented, the amounts of damages awarded were excessive. We therefore reduce the amount of each respondent's damages award to $10 million ($5 million compensatory damages, $5 million punitive damages), conditioned on respondents' consent.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2007, Marciano sued a former employee, Fahs, for conversion. A month later, Marciano filed a first amended complaint, adding another former employee, Chapnick, as a defendant.

Marciano's operative verified second amended complaint was filed in February 2008. In addition to Fahs and Chapnick, the second amended complaint alleged claims against three other former employees of Marciano—Choi, Tagle, and Abat—as well as other defendants no longer party to this appeal. According to the second amended complaint, Choi worked for Marciano for over 17 years as his chief bookkeeper and an office manager. Abat worked for Marciano for over 12 years, handling business and personal mail and checking. Tagle worked for Marciano for nine years as a bookkeeper. Chapnick worked for Marciano for four years as an administrative assistant. Fahs worked for Marciano for several months in 2007, primarily handling information technology matters. Marciano's second amended complaint alleged that defendants engaged in a vast conspiracy through which they stole artwork, business property, money, and other assets collectively worth tens of millions of dollars.

Each of these five former employees, respondents in this appeal, filed cross-complaints against Marciano.[3] The cross-complaints contained defamation/libel and

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[2] Marciano filed various appeals (B215463, B216598, B220011) which were consolidated with this main appeal (B218087).

[3] The cross-complaints also named Marciano's company Beverly Wilshire Properties, Inc. (BWP) as a cross-defendant. In addition to Marciano, BWP is a self-described appellant in this appeal. However, the final judgments only imposed damages

intentional infliction of emotional distress causes of action, among other claims. In general terms, the cross-complaints alleged that Marciano engaged in a campaign to ruin respondents' reputations and lives by, among other destructive acts, writing and sending numerous letters and e-mails to respondents and dozens of other recipients accusing respondents of lying and stealing millions of dollars. Choi's cross-complaint, for example, detailed at least 23 vengeful and incendiary communications sent by Marciano between April 2006 and November 2007 declaring his desire to "ruin" her and others; accusing her and her husband (a church minister) of stealing millions of dollars from cashed checks; asserting that Choi "is currently being investigated for fraud and embezzlement by the IRS and all federal agencies"; charging Choi, Abat, and Tagle of "defrauding me of millions of dollars and furniture and I believe coins, art, wine, etc."; accusing Choi's husband of "running a money-laundering operation from his church"; denouncing Choi, Abat, Tagle, and others as a "team of crooks"; claiming that Choi destroyed boxes of financial documents; and accusing her of numerous other misdeeds. In addition, Choi's cross-complaint alleged that Marciano filed five false IRS 1099 forms for inflated amounts bearing no relationship to Choi's actual salary, which caused Choi to be audited by the IRS.

In prosecuting his own action, Marciano vigorously sought discovery from defendants. He propounded at least 51 sets of written discovery requests, noticed at least 49 depositions and continuations of depositions of defendants, and served at least 33 subpoenas on nonparties. Chapnick alone submitted to five separate deposition sessions, each of which was conducted by new and different counsel for Marciano, or by Marciano himself.

Meanwhile, Marciano persistently flouted his own discovery obligations and, in a transparent attempt to upend the litigation process, repeatedly substituted counsel. A declaration submitted by counsel for a defendant no longer party to this appeal, Deborah

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awards against Marciano; respondents' claims for attorney fees against BWP were dismissed.

McLeod, detailed how Marciano continually avoided responding to written discovery by repeatedly substituting in new attorneys just before responses were due. The new attorneys, who were unfamiliar with the case, would request additional time to learn the case and prepare the responses, and opposing counsel would have no choice but to acquiesce. Then, around the time responses became due, Marciano's then-attorneys would be substituted out for another set of attorneys. Through this scheme, Marciano consistently postponed responding to discovery, and when he did respond, his responses were overwhelmingly deficient.

Further complicating matters, despite having filed the verified second amended complaint charging defendants with stealing at least tens of millions of dollars, Marciano refused to sit for deposition, leaving defendants unable to discover what, if any, evidence Marciano had to support his wild accusations.

Terminating sanctions as to Marciano's action

In June 2008, trial was set for February 11, 2009, with a discovery cutoff date of January 12, 2009. In September 2008, Chapnick's counsel sent letters to two sets of Marciano's attorneys requesting convenient deposition dates, but he received no response. Chapnick then noticed Marciano's deposition for October 6, 2008. After receiving a request to reschedule the deposition to accommodate Marciano's travel plans, Chapnick rescheduled the deposition to October 20, 2008.

Late in the afternoon on the Friday before Monday, October 20, Marciano faxed a notice of motion for protective order, effectively preventing the deposition from going forward. Marciano argued that he could not appear at deposition because he had recently retained new counsel and because he needed to complete his own discovery before he could be deposed. On November 17, 2008, the trial court denied the motion for protective order, finding it was made "without substantial justification," and awarded attorney fees to Chapnick in the amount of $6,750. At the hearing, the trial court stated: "I am extremely concerned that Mr. Marciano fails to appreciate the fact that the taking of his deposition is in no way dependent upon his receipt of discovery, particularly documents from third parties. He chose to file this lawsuit. He chose to subject himself

to the jurisdiction of this court. He chose to subject himself to the rules of discovery. And to the extent that we are looking at a trial date which is relatively imminent, his inability to cooperate and make himself available for deposition gives this court great pause. I do not think the motion for protective order is well taken. I think we are bordering on obstreperous conduct . . . ." The court ordered the parties to meet and confer during a break in the hearing, but Marciano and his counsel refused to provide any deposition dates to defendants and their counsel.

After not receiving any dates for Marciano's deposition, Chapnick, in consultation with the other defendants, rescheduled the deposition for December 3, 2008. On December 2, 2008, Marciano served a "demand for certified French interpreter," despite having already appeared in court without an interpreter, having filed declarations and other court documents in English, having taken depositions in English, and never previously stating that he needed an interpreter. Marciano failed to appear for his deposition on December 3, 2008.

Chapnick then filed a motion for an order of terminating sanctions on Marciano's second amended complaint, in which the other defendants joined. Soon after, Marciano substituted himself in place of his most recent attorneys, and filed in propria persona a lengthy opposition (written entirely in English).

The motion for terminating sanctions was heard on December 31, 2008. At the hearing, the trial court recounted in detail each of Marciano's many changes of counsel. The court noted it was "one of the most problematic aspects of the case. Every attorney that has purported to represent Mr. Marciano in this case has come in and said, 'Your Honor, I need time to get up to speed. Your Honor, I need time to conduct discovery. Your Honor, I'm not privy to what happened with prior counsel.'" The trial court further recalled how, in connection with Marciano's denied motion for protective order, the court made clear that Marciano had to make himself available for deposition and was to provide dates for his deposition, but he failed to comply. The court found that although the parties and the court had attempted to make Marciano appear for deposition, it was

"dreadfully clear" that Marciano would not cooperate. After hearing argument, the trial court granted the motion for terminating sanctions on the action brought by Marciano.

The order entered by the trial court granting the motion for terminating sanctions found, in pertinent part: "Marciano has filed no fewer than 16 substitutions of counsel changes in this case, causing substantial burden, delay, confusion and expense to the Court and all parties. This multiplicity of substitutions were [*sic*] made for strategic and/or tactical reasons known only to Marciano. [¶] The Court finds that the record is replete with evidence of the defendants' efforts to obtain Marciano's deposition prior to and after seeking judicial intervention. [¶] Notwithstanding the Court's specific Order to the contrary, in *ex parte* papers submitted to this Court by Marciano on December 23, 2008 (seeking to continue the hearing on the Motion so that Marciano could avoid interruption to his vacation), Marciano once again took the position that he need not submit to deposition until he had completed discovery to his own level of satisfaction. [¶] Similarly, at the hearing on the Motion [for terminating sanctions], Marciano failed to establish any good faith basis or excuse for his conduct. Furthermore, Marciano once again failed to display any willingness to submit to the taking of his deposition. No offer was made by Marciano at the hearing to submit to the deposition at any time prior to the discovery cutoff—or thereafter. [¶] Other defendants have likewise made extensive efforts to obtain Marciano's deposition and obtain other discovery from him."

The trial court's rulings included the following: "Marciano has refused to submit to his deposition which was originally properly noticed to take place on October 20, 2008, and he has in bad faith refused to participate in defendants[']efforts to schedule such deposition . . . . [¶] Marciano's refusal has been undertaken in bad faith and in contempt and violation of this Court's orders and rulings, made in connection with the Court's ruling denying the motion for protective order, that Marciano must submit to deposition without further delay. [¶] That, although the Court finds that it ordered Marciano to submit to deposition on November 17, 2008, Marciano's continuing refusal to agree to sit for deposition is indicative of his pattern of discovery abuses and that terminating sanctions are appropriate in this matter given the extraordinary and flagrant

nature of Marciano's refusal to submit to deposition . . . . [¶] Marciano has been repeatedly ordered to comply with discovery and sanctioned for discovery abuses in both this action and the related *Iskowitz* action [B216029; BC384493], demonstrating a consistent pattern of discovery abuse that will not be—and has not been—resolved by a lesser sanction, and given Marciano's months-long lack of cooperation in providing straightforward information, witnesses and documents to support his claims, the Court finds that an order compelling Marciano's deposition is likely to be futile. [¶] Marciano's well-documented history demonstrating his pattern of discovery abuse is significant in deciding whether to impose terminating sanctions." On these bases, the trial court granted the motion for terminating sanctions, striking Marciano's second amended complaint as to all defendants.

Terminating sanctions as to respondents' actions

Nevertheless, Marciano's refusals to submit to deposition continued unabated. When Marciano ignored further requests to provide convenient dates for deposition, Choi and Abat properly noticed his deposition for December 15, 2008. On December 12, Marciano served another "demand for certified French interpreter," and on December 15 he failed to appear. Thereafter, Choi and Abat suggested alternative dates for the deposition, but Marciano did not respond again.

On December 19, 2008, Choi and Abat served a notice of deposition for January 6, 2009, and concurrently served a motion for an order of terminating sanctions and striking Marciano's answer to their cross-complaints, or for an order compelling Marciano's attendance at deposition. On January 5, 2009, the trial court heard the motion. Marciano appeared and argued the motion (in English). When told that the motion to compel the January 6 deposition would be granted, Marciano told the court that he was sick, but "If you give me two days, it will be fine. I really apologize for that, but two days will be great." The trial court did not believe Marciano's claim that he was sick, ordered him to appear for deposition on January 6, and imposed monetary sanctions of $3,000.

Marciano did not appear for deposition on January 6. Instead, he submitted a letter from a doctor who, according to a declaration executed by Choi, was a close

personal friend of Marciano's. The doctor's letter, dated January 5, stated that Marciano had been suffering from bronchitis for two weeks and that attending deposition on January 6 would cause a worsening of his condition.

On January 8, 2009, Choi and Abat filed an ex parte application to set a hearing date and briefing schedule on shortened time for an order striking Marciano's answer to the cross-complaints. In opposition, Marciano stated that he was currently too sick to sit for deposition, but would be well enough and would appear for deposition on January 12. The trial court ordered Marciano to appear for deposition on January 12 and 23, 2009. The court separately ordered that the terminating sanctions motion be heard on January 27.

Marciano did not appear for the January 12 deposition. Instead, to later explain his absence, Marciano submitted a letter from another doctor dated January 20, 2009, stating that Marciano had experienced a "possible transient ischemic attack" requiring hospitalization from January 12 through 14, 2009. Marciano also missed the January 23 deposition. No excuse was given for this absence. Choi and Abat presented evidence showing that on days Marciano was supposedly too ill to attend deposition, he was blogging and posting videos on the Internet in which he talked about himself and his problems with respondents.

After receiving briefing and argument, the trial court granted Choi and Abat's motion for terminating sanctions on January 27, 2009, striking Marciano's and BWP's answers to the cross-complaints. The court found the letters submitted by Marciano's doctors to be unpersuasive, and found that terminating sanctions were appropriate due to Marciano's failures to comply with the court's order to appear for deposition. The court concluded that any lesser order would only be futile.

Thereafter, the remaining respondents each filed their own motions for terminating sanctions. Eventually, terminating sanctions were awarded in favor of each respondent, Marciano's answers to each of their complaints were struck, and Marciano's default was

entered. Each respondent also moved for and was awarded monetary sanctions for Marciano's discovery abuses.[4]

Default prove-up hearing

The trial court held a default prove-up hearing on liability on May 15 and 18, 2009. After hearing testimony from respondents and receiving other evidence, the court ruled that all respondents proved their claims for, inter alia, defamation or libel, and intentional infliction of emotional distress.

The court's rulings detailed a litany of wrongful acts perpetrated by Marciano. As to Choi's claim for defamation, the trial court found that Marciano made untrue statements to third parties calling Choi a criminal and a thief, and accusing her of embezzlement, of committing fraud, of stealing money, coins, and art, of cooking the books, and of destroying financial records. As for Abat's claim for libel, the court found that Marciano made untrue statements to third parties stating that Abat was a criminal; was involved in embezzlement and fraud; that she had defrauded Marciano of millions of dollars and furniture, coins, and wine; and that she was part of a team of crooks. As to Chapnick, the trial court found that Marciano made untrue statements to third parties stating that Chapnick stole documents; that he had broken into Marciano's penthouse; that he conspired with coworkers to steal Marciano's art, wine, and money; and that he forged documents. The court found that Fahs established that Marciano made untrue statements to third parties that Fahs had erased e-mails from servers, and that he stole Marciano's identity, Social Security card, passport, and credit cards. Finally, as to Tagle, the court found that Marciano made untrue statements to third parties that Tagle was part of a "team" that embezzled money from Marciano; that she made cash withdrawals from Marciano's accounts without his consent or knowledge; that she defrauded Marciano of

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[4] Marciano appealed from the orders awarding these monetary sanctions. (B216598.) However, in his appellate briefs, Marciano makes no argument regarding the propriety of the orders granting monetary sanctions, and there is no compelling reason to reverse them.

millions of dollars and furniture, coins, art, and wine; and that she was a "crook." The court further found that Marciano's conduct was outrageous and was intended to cause, and did cause, respondents to suffer severe emotional distress. In addition to making threats and false accusations, Marciano filed false 1099 forms, causing Choi, Abat, and Tagle to be audited.

Presentation of damages

On July 20, 2009, pursuant to Code of Civil Procedure section 585, subdivision (b), the trial court empanelled a jury for the purpose of assessing damages. Over the next five days respondents presented testimony and documentary evidence, as well as opening and closing statements. Numerous witnesses testified.

Steven Chapnick

Chapnick testified that he worked in property management for Marciano. At first, Marciano only accused Choi, Abat, and Tagle of embezzlement, not Chapnick. Marciano's suspicions grew to include Chapnick, however, and at a meeting Marciano accused Chapnick of stealing artwork and other property, calling him a "thief" and a "liar" when he denied doing so. Marciano fired Chapnick, and began sending threatening and defamatory e-mails and letters.

Chapnick grew terrified that Marciano would have him arrested or otherwise cause him harm. Marciano hired private investigators to follow Chapnick, his elderly and disabled parents, and his brother, who suffers from bipolar disorder. As a result of Marciano's harassment, Chapnick suffered depression, insomnia, appetite fluctuations, fear, fatigue, and irritability. He started seeing a psychiatrist for the first time in his life and was prescribed medication for depression and anxiety. Moreover, according to Chapnick, his reputation in his industry suffered. After losing his job managing a multi-million dollar portfolio of real estate for Marciano, Chapnick was unable to find similar work, and eventually had to take a facilities maintenance job, a type of job he had not done for 15 years.

Miriam Choi

Choi testified that, after working for Marciano for 17 years, she resigned when Marciano started accusing her of embezzlement. Marciano then began bombarding her and others with e-mails and Federal Express packages containing defamatory materials. Marciano threatened to "ruin" her and promised that he would not stop in his pursuit. At Marciano's behest, a criminal investigation was initiated against Choi.

Choi grew depressed and terrified that she would be sent to jail. She dreaded seeing the Federal Express truck arrive because it could be carrying packages from Marciano. When she received the false 1099 forms she knew that she would be audited, and, in fact, she was. She had to hire a certified public accountant, who cleared the matter up, but only after she was questioned twice by an IRS agent and paid taxes for $200,000 in income that she never received (the taxes were eventually refunded after the audit was completed).

Choi had been the primary earner in her family, but after resigning from Marciano's employ it took her four months to find another job. When she got a new job, she was scared that her new employer would find out about Marciano's charges and fire her. Members of her community actually did learn about Marciano's accusations. Choi testified that her husband, the minister, would likely never be able to obtain a senior pastor position because of it.

Choi's relationship with her family suffered. Choi spent most of her time alone in her room crying. Her daughter told her that she felt Choi was never there for her anymore; she asked her: "When can I have my mom back?" Choi lost weight, could not sleep, lost hair, experienced chest pains, had no energy, and suffered depression. She felt paralyzed with fear.

Eventually, Choi learned that criminal charges against her would not be pursued. Soon after, however, Marciano filed his civil lawsuit against her.

Joseph Fahs

Fahs had worked for Marciano since 2003 providing information technology services. In July 2007, Marciano sent an e-mail to Fahs firing him and accusing him of

deleting all of his e-mails and stealing his identity, including copies of his driver's license, Social Security number, and credit card. Marciano copied approximately 50 other people on the e-mail. Soon after, Marciano filed suit against Fahs and obtained a temporary restraining order against him. Marciano also created websites making accusations against Fahs and other respondents.

Fahs was scared of Marciano. Fahs eventually moved out of Los Angeles County in order to avoid situations that might remind him of Marciano. Fahs had difficulties with his appetite and insomnia and sought treatment from a psychologist. He felt scared for his personal safety and testified that if he could afford it, he would hire a security team to provide him protection. He believed that Marciano would not stop in his pursuit of him.

Elizabeth Tagle

Tagle testified that she began working for Marciano in 1997, mostly doing bookkeeping. In January 2006 Marciano placed Tagle on leave from her job, and he fired her in March 2006. At first, Marciano accused Tagle and other respondents of embezzling $1 million. This number eventually grew to $413 million.

Marciano sent e-mails and letters to Tagle and others accusing her of stealing money and property. Tagle was afraid that Marciano would have her thrown in jail.

Marciano also filed false 1099 forms for Tagle. For example, in September 2006, Tagle received a 1099 form for the 2001 tax year showing $50,000 in compensation, despite the fact that she had only earned $41,999 in 2001, and had received a W-2 for that amount long ago. She also received a false 1099 form for $10,000 for 2005, even though her total income for that year was $45,000, as reflected in her W-2.

Tagle testified that before Marciano's accusations began, she was a very confident person and her entire family relied on her. She was active and social, not just with family members, but also with friends. However, after she was fired and started receiving Marciano's packages and e-mails, she felt ashamed, embarrassed, helpless, useless, and devastated, and did not want to talk to anyone. Her income decreased significantly, since she was unable to continue operating the financial services business that she started after

leaving Marciano's employ. She felt unable to look for another job, because she was afraid potential employers would discover the accusations of theft and embezzlement, which Marciano had posted on the Internet. Friends of hers did find out about the accusations, causing her great shame.

Tagle started seeing therapists and psychiatrists and attending group therapy to deal with the trauma. She was diagnosed with acute stress and major depression. She was stricken with insomnia, frozen shoulders, rashes, and hives. She exhibited suicidal ideation, and was prescribed medication for depression and anxiety.

Tagle testified that she did not think she would ever find peace because of Marciano's crusade against her. She believed that Marciano would never stop, and that he had the money to carry on the campaign forever.

Camille Abat

Abat testified that she started working for Marciano in 1996 as an administrative assistant. In January 2006, Abat was placed on leave, and she was fired in March.

In April, she started receiving packages and e-mails from Marciano that were identical or similar to those received by other respondents. Marciano accused her of theft and embezzlement. He threatened to "ruin" her. Marciano not only had Federal Express packages delivered to Abat at her home, he also had them delivered to Abat's husband at his workplace. Moreover, in September 2006, Abat received a tax year 2005 1099 form from Marciano for an amount greater than $1 million, when she actually made only $34,000, as reflected in her W-2.

Abat grew scared of going to prison. Marciano sent her photographs of people being handcuffed and taken to jail. Soon after, she learned that she was the subject of a criminal investigation. She was called into the sheriff's department to face questions from a detective.

Abat was terrified by Marciano's threats and accusations, which made her feel like she would have a heart attack. Her relationships with her husband and her three children suffered. She stopped attending her children's events, was always in a bad mood, and felt "like a candle, you know, melting." Thoughts of Marciano completely dominated Abat's

life. She had no energy, lost much of her hair, experienced choking feelings and numbness on her face, and got severe headaches. She was prescribed anti-anxiety medication.

Abat testified that she no longer felt comfortable driving by herself and was paranoid every time she left her house.

Georges Marciano

During the middle of trial, Marciano entered the courtroom with an entourage, apparently to observe the proceedings. Because he was in default, he was not allowed to present a defense, but when asked whether he would like to testify, Marciano responded: "With pleasure, your Honor." Marciano took the stand and answered questions from respondents' attorneys for nearly an hour, but did not return after the lunch break to complete his testimony.

When testifying, Marciano admitted that he had hired people to picket outside the courthouse during trial and to hand out flyers about the case when the jury left the building. Marciano claimed that respondents had stolen about $300 million from him, and possibly as much as $413 million. He testified that he had complained about respondents to the Los Angeles County Sheriff's Department, the Beverly Hills Police Department, the Los Angeles County District Attorney's Office, the Federal Bureau of Investigation, the California Franchise Tax Board, the Internal Revenue Service, and the United States Attorneys' Office. Marciano stated that he was on a "crusade" that would last the rest of his life—he would never stop trying to have respondents put in jail.

Detective Alex Gilinets

Detective Gilinets is a detective with the Los Angeles County Sheriff's Department who investigates fraud. He was tasked with investigating Marciano's complaints against respondents.

Detective Gilinets testified that, prior to the time Marciano brought his complaints to the Sheriff's department, Marciano had commissioned at least three separate private audits to determine what had been stolen from him by respondents. None of the audits uncovered any wrongdoing.

Detective Gilinets conducted his own investigation to determine what, if anything, had been stolen. He combed through stacks of documents, talked with Marciano and his associates, and interviewed respondents. He estimated that he spent 400 to 500 hours investigating Marciano's complaints—the longest investigation of his career. After spending all of that time, the detective testified: "Based on everything I looked at, all of his records, all of their records, all the statements that were made to me, everything that I was able to find, I can't—I can't see anything that would show that [respondents] did anything wrong . . . ." Detective Gilinets concluded that Marciano was likely delusional and paranoid, and potentially dangerous.

Jim Chafee

Jim Chafee is a security consultant who was retained to give his expert opinion on the risk presented to Choi and Abat by Marciano. Chafee testified that he determined that Marciano was "dangerous," and that at any point Marciano's behavior could "become violent and a physical danger" to Choi and Abat.

Chafee recommended that Choi and Abat have twice-a-year "electronic sweeps" of their vehicles and premises to check for listening devices and keystroke loggers. The cost of the sweeps would be $5,000 per year. He also recommended that they have centrally monitored alarm systems installed at their residences, as well as closed-circuit television. The alarm system would cost $6,000 to $10,000 to set up, and $900 yearly for monitoring. The closed-circuit television system would cost $10,000 to $15,000. Finally, Chafee recommended that Choi and Abat hire round-the-clock armed security teams to protect them and their families. The cost of an off-duty police security team (the best option, according to Chafee) would be $873,000 per year, while the cost of a private security team would be $524,000.

Chafee recommended that Choi and Abat employ these security measures for 20 years. He also testified that his recommendations would apply to all respondents.

Anthony Reading

Dr. Reading, a clinical psychologist and clinical professor at UCLA, testified regarding his examinations of Choi and Abat. He testified that both Choi and Abat were

clinically depressed, and both exhibited elevated levels of anxiety consistent with trauma. Both were experiencing chronic, unrelenting stress and feelings of helplessness.

Dr. Reading opined that both Choi and Abat would need years of therapy and psychiatric medication, and possibly need such treatment for the rest of their lives. Therapy could cost $1,000 per month, and medication and monitoring could cost $900 a month.

Closing Argument

Attorneys for each respondent made closing arguments to the jury. Counsel for Choi and Abat proposed an estimate of damages that (according to counsel) would adequately compensate each of the respondents. It is unclear from the record exactly how counsel arrived at the damages estimate. It appears that $17,267,910 was requested for future economic loss, based on costs of security and psychiatric treatment. Past mental suffering and physical pain was estimated at $4,130,000—an amount constituting 1/100th of the largest amount that respondents were accused of stealing. Some further amounts were also requested for future mental suffering and physical pain; injury to reputation; and shame, mortification, or hurt feelings. In the end, it appears that counsel requested a compensatory damages award of at least $64,871,970 for each of the respondents.

The advisory verdicts

After deliberating, the jury rendered advisory verdicts awarding each of the respondents the same amount of total compensatory damages: $69,044,000. The verdict form split components of damages into separate causes of action and types of harm. With respect to intentional infliction of emotional distress, the jury awarded $14,044,000 for future economic loss; $5 million for past mental suffering and physical pain; and $15 million for future mental suffering and physical pain. Damages for defamation were $17.5 million for injury to reputation and $17.5 million for shame, mortification, or hurt feelings.

The jury also awarded each respondent $5 million in punitive damages, for a total advisory verdict in favor of each respondent of $74,044,000.

The judgments

The trial court originally entered judgments in favor of each respondent for the full amounts awarded by the advisory jury. After it was brought to the court's attention that respondents' previously filed statements of damages were for lesser amounts, the court remitted the judgments to conform with the statements of damages. The final judgments against Marciano were in favor of respondents as follows: Chapnick—$25 million; Abat—$55 million; Choi—$55 million; Fahs—$55 million; Tagle—$15.3 million. The final judgments were inclusive of the $5 million in punitive damages awarded to each respondent.

DISCUSSION

Marciano appeals from the final judgments, as well as various intermediate rulings and orders. We address each of his appeals (B218087, B215463, B216598, and B220011) in this opinion.

I. Imposition of Terminating Sanctions

A. Review of Terminating Sanctions

An order imposing discovery sanctions is reviewed for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).) "Discovery sanctions 'should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.' [Citations.] '"The trial court has a wide discretion in granting discovery and . . . it is granted broad discretionary powers to enforce its orders but its powers are not unlimited. . . . [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]"' [Citation.]" (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488.)

A discovery sanctions order is reversible only for "arbitrary, capricious, or whimsical action." (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 114.) "[T]he question before this court is not whether the trial court should have imposed a lesser

sanction; rather, the question is whether the trial court abused its discretion by imposing the sanction it chose." (*Do It Urself Moving & Storage. Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36-37 (*Do It Urself*).)

Code of Civil Procedure section 2023.030 provides that a court, after notice and opportunity for a hearing, may impose sanctions for "misuse of the discovery process." Available sanctions include terminating sanctions by striking the pleadings, or by dismissing the action. (Code Civ. Proc., § 2023.030, subds. (d)(1), (3).)

Section 2023.030 further states that sanctions can be imposed "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title." This has been held to mean "that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes." (*New Albertsons, supra*, 168 Cal.App.4th at p. 1422.) Sanctions not specifically authorized by the applicable statute, however, may be properly imposed in exceptional circumstances. (*Id.* at p. 1423.)

B. Terminating Sanctions on Marciano's Complaint

Code of Civil Procedure section 2025.450, subdivision (d) provides that if a party "fails to obey an order compelling attendance" at deposition, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction . . . against that party deponent." Marciano claims he never failed to obey an order compelling his deposition prior to the time that his second amended complaint was struck, and therefore the trial court was without authority to issue terminating sanctions. We disagree. [5]

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[5] In their respondents' brief, Choi and Abat request that this Court dismiss the appeal because Marciano has failed to comply with multiple court orders. An appellate court has the inherent power to dismiss an appeal by a party who has refused to comply with trial court orders. (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379.) That power is discretionary. (See *ibid.*; *People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897.) Exercising our discretion, we decline to dismiss this appeal. We also decline to take judicial notice of the exhibits attached to Choi and Abat's August 1, 2011, motion

Although terminating sanctions are severe and justified only in limited circumstances, they may properly be imposed when "the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent." (*New Albertsons, supra*, 168 Cal.App.4th 1403, 1423.) Here, Marciano's obligation was clear. On November 17, 2008, the trial court denied Marciano's motion for protective order and issued monetary sanctions. The court made clear that Marciano had to proceed with the taking of his deposition, thoroughly rejecting his argument that he should be allowed to complete his own discovery before being deposed.

It is likewise readily apparent that Marciano failed to comply with his obligation. Although ordered to meet and confer, Marciano refused to provide possible dates for deposition. Then, he avoided deposition by claiming to need a French interpreter, despite living and conducting business in the United States for decades, appearing in court in this case in propria persona, and taking depositions himself. Next, in ex parte papers seeking to avoid interruption to his vacation, Marciano again argued that he did not need to submit to deposition until he had completed his own discovery. Under these circumstances, Marciano's conduct constituted failure to obey a court order.

Even if, as Marciano dubiously contends, there was no clear court order requiring him to sit for deposition, terminating sanctions were still appropriate because Marciano "engaged in a pattern of willful discovery abuse that cause[d] the unavailability of evidence." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1215; see also *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1544-1549; *Do It Urself, supra*, 7 Cal.App.4th at p. 35; *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799-800.) Marciano abused the discovery process and caused the unavailability of evidence by refusing to sit for deposition and substantiate his claims (made by verified complaint) that respondents had stolen tens or even hundreds of millions of dollars from him. He effectively prevented respondents from filing motions for summary judgment—even by

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requesting judicial notice and March 29, 2012, supplemental request for judicial notice, as the exhibits are pertinent only to the request for dismissal.

the discovery cutoff date, he still had not sat for deposition. He constantly changed counsel for his own advantage, one of many tactics designed for delay and to overwhelm the financially vulnerable defendants. Moreover, he was not deterred by the imposition of mere monetary sanctions.

The trial court did not err by concluding that Marciano would never submit to deposition and therefore terminating sanctions were appropriate. A refusal to comply with discovery requests may be considered an admission that the disobedient party does not have a meritorious claim. (*Karlsson v. Ford Motor Co.*, *supra*, 140 Cal.App.4th at p. 1215.) Furthermore, lesser sanctions may be inappropriate when they would only be futile. (See *Do It Urself*, *supra*, 7 Cal.App.4th at p. 36.) Marciano demonstrated no willingness or capacity to ameliorate his extreme obstructionist behavior. He had no intention of complying with his discovery obligations or the court's orders, and therefore terminating sanctions were warranted. (See *Del Junco v. Hufnagel*, *supra*, 150 Cal.App.4th at pp. 799-800.)

C. Terminating Sanctions Striking Marciano's Answers

Continuing his pattern of obstinacy, even after his second amended complaint was struck, Marciano disobeyed further court orders. Marciano's argument that the trial court abused its discretion by striking his answers to respondents' cross-complaints must therefore also be rejected.

Marciano makes much of the trial court's alleged disregard for two doctors' letters stating that Marciano was ill on January 6 and 12, 2009—dates that he was ordered to attend deposition. But the trial court had valid reasons not to place great weight on the letters. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 [generally a trier of fact may reject the testimony of an expert witness, even if uncontradicted].) Evidence showed that one of the letters was written by a close, personal friend of Marciano's. Furthermore, Marciano was well enough to appear in court on January 5, 2009, and participate in oral argument. No evidence was presented that he got worse overnight. Moreover, despite the trial court's request for medical records substantiating

his claims of illness, Marciano failed to provide any such records to the trial court.[6] In addition, evidence was presented that on days Marciano was supposedly too sick to be deposed, he was blogging and posting videos on the Internet complaining about respondents.

In any event, even if Marciano was too ill to attend deposition on January 6 and 12, 2009, he provided no excuse for his failure to attend on January 23, 2009, another date he was ordered to appear. The trial court, therefore, did not abuse its discretion by finding that Marciano failed to obey its orders to appear at deposition, and striking Marciano's answers.

II. Timing of Statements of Damages

Marciano next contends that respondents' statements of damages (Code Civ. Proc., § 425.11) were served too late to give Marciano adequate notice of his potential liability.

A statement of damages is used to provide the defendant with notice of the nature and amount of damages sought in a personal injury or wrongful death case. (Code Civ. Proc., § 425.11, subd. (b).) It must be served on a defendant "before a default may be taken." (Code Civ. Proc., § 425.11, subd. (c).) Because the "defendant is entitled to actual notice of the liability to which he or she may be subjected," the statement of damages should be served "a reasonable period of time before the default may be entered." (*Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 435.)

Exactly what constitutes a "reasonable period of time" has not been precisely defined. Service of the statement of damages 15 days before entry of default has been

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6 BWP's March 16, 2012, motion for production of additional evidence on appeal or, alternatively, for judicial notice is denied. Absent exceptional circumstances we, as the appellate court, do not make findings of fact. (*In re Zeth S.* (2003) 31 Cal.4th 396, 397.) No such exceptional circumstances exist here. Furthermore, Marciano offers no valid reason as to why the medical records he seeks to have us consider by motion were not presented to the trial court. Moreover, the medical records are not appropriate for judicial notice.

found sufficient (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1323), as has service concurrent with a motion for terminating sanctions. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1178 (*Electronic Funds*) ["Plaintiffs served their notice of punitive damages concurrently with their motion for terminating sanctions. Because service occurred before the entry of default, the notice of punitive damages was timely."].) Service of the statement two days before entry of default has been held to be insufficient, however. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 62.)

We find that each respondent here served his or her statement of damages adequately in advance of the taking of default. Choi and Abat served their statements on January 14, 2009, 13 days before Marciano's answers to their cross-complaints were ordered struck. Fahs and Chapnick both served their statements more than a month before Marciano's answers to their cross-complaints were ultimately struck, and Tagle served hers 23 days in advance. Thirteen days—the shortest of these periods – provided Marciano with sufficient notice of his potential liability.

Marciano's contention that he received the statements of damages too late to allow him to alter his wrongful conduct is also unavailing. In *Electronic Funds*, the defendants made essentially the same argument—that plaintiffs' service of notice of punitive damages concurrent with a motion for terminating sanctions violated defendants' due process rights because it occurred *after* their destruction of evidence. This argument was rejected by the Court of Appeal: "In other words, defendants argue they would not have misused the discovery process had they known their liability could reach $24 million. The argument implicitly suggests that had they received proper notice and chosen not to participate in the lawsuit, they also had the option to destroy the evidence requested in discovery. We reject this contention. [¶] There is a significant difference between choosing not to defend a lawsuit at all, and defending a lawsuit by willfully disobeying lawful discovery orders. Defendants willing to accept known liability may properly elect to watch from the sidelines. But *if a defendant chooses to participate, he or she must play by the rules.*" (*Electronic Funds, supra*, 134 Cal.App.4th at p. 1178, italics added.)

III. Adequacy of the Cross-Complaints

A. Affirmative Defenses

Marciano argues that the judgments in favor of respondents improperly rested on legally defective cross-complaints. He contends that many of the allegedly libelous communications were time-barred, privileged, or not defamatory.

Marciano's argument fails to account for the procedural consequences of default. A judgment by default "'is said to "confess" the material facts alleged by the plaintiff, i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint.'" (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823.) The statute of limitations is an affirmative defense (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310), as is the litigation privilege (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 492), and whether a statement constitutes an actionable opinion (see *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1471). Since Marciano "admitted" all material facts in the cross-complaints, he could not show the facts necessary to establish these affirmative defenses.[7]

B. Chapnick's Cross-Complaint

Marciano next asserts that the judgment in favor of Chapnick was premised on an inoperative cross-complaint. Chapnick's second amended cross-complaint contained, among other examples of defamatory communications, reference to a September 1, 2007, e-mail from Marciano to numerous companies, stating that Chapnick had been fired for "very serious multiple causes," and that he was under investigation. The allegation was pled in paragraph 7 of the second amended cross-complaint. Marciano filed a demurrer and motion to strike, arguing that the parties had stipulated to various amendments to

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[7] Marciano's argument that respondents' claims for emotional distress all arose in connection with their employment with BWP and that such claims were barred by the exclusive remedy provisions of the Workers Compensation Act (Lab. Code, § 3602) similarly fails. As a consequence of the default, Marciano was unable to prove that respondents' claims fell within the ambit of Labor Code section 3602.

Chapnick's cross-complaint, but not to the inclusion of the communication referenced in paragraph 7. The trial court thereafter ordered paragraph 7 struck, and Chapnick filed a third amended cross-complaint identical in all respects to the second amended cross-complaint, except that paragraph 7 was omitted. Nevertheless, the trial court's later order granting terminating sanctions stated that default was entered on Chapnick's second amended cross-complaint, and the final judgment entered in favor of Chapnick also stated it was based on the second amended cross-complaint.

Citing to *Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891, 901, Marciano argues that Chapnick's second amended cross-complaint ceased to have any effect and could not form the basis for judgment. While we agree that reference to a nonoperative complaint in the order granting terminating sanctions and the judgment was obviously in error, the error was simply one of form, and does not provide basis for reversal. "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475.) Default was entered based on Marciano's disregard for the rules of discovery and the trial court's orders. He suffered no prejudice because of the incorrect reference to the second amended cross-complaint, which came well after his relevant wrongful conduct.

Marciano also contends that Chapnick improperly referenced the September 1, 2007, communication at trial. Simply because the communication was not part of the operative pleading, however, did not mean that any mention of it was forbidden. "If extraneous evidence is introduced at the prove-up hearing, defendant lacks standing to

complain." (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303.) The September 1, 2007, communication was presented as one of numerous examples of similar libelous communications made by Marciano. Chapnick's libel claim was supported by other communications, as was the claim for intentional infliction of emotional distress. Thus, there is no basis on this ground for reversal.

IV. Compensatory Damages Requested and Awarded

As noted above, the jury's advisory verdict awarded specific amounts for each type of damages requested in the verdict form: (i) intentional infliction of emotional distress—$14,044,000 for future economic loss, $5 million for past mental suffering and physical pain, and $15 million for future mental suffering and physical pain; (ii) defamation—$17.5 million for injury to reputation and $17.5 million for shame, mortification, or hurt feelings; and (iii) punitive damages—$5 million. However, the statements of damages served by respondents did not specifically request all of these types of damages and generally sought lesser amounts than were awarded by the advisory jury. When these issues were raised with the trial court, the court simply reduced the amounts awarded to each respondent to conform with the total amount requested by each respondent in their statements of damages. For example, in Chapnick's statement of damages form, he gave notice that he was seeking $10 million for emotional distress, $5 million for harm to reputation, $5 million for shame, mortification, and hurt feelings, and $50 million in punitive damages. The final judgment awarded him a total of $25 million (including $5 million for punitive damages).

The advisory verdicts rendered by the jury suffered from several flaws, not all of which were cured by the trial court's remittitur of the awards. We address these as follows. [8]

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[8] Marciano's March 23, 2012, request for judicial notice is denied. While we recognize that Marciano was a party to an appeal in Division 3 of this Court, *Georges Marciano et al. v. Gary Iskowitz et al.* (B216029), in which oral argument was held, that fact does not assist us in making our determinations in this appeal.

A. Future economic loss

During closing argument, counsel for Choi and Abat requested that the advisory jury, in completing the verdict form for "future economic loss," award the amounts testified to by the expert witnesses for future costs of security and psychiatric treatment. It appears that this is what the jury did, because the advisory verdict awarded each respondent $14,044,000 for future economic loss.

Respondents' statements of damages, however, contained no request for "future economic loss." They were therefore precluded from seeking such damages. In a personal injury or wrongful death case, the statement of damages functions as a pleading delimiting the damages sought. (See Code Civ. Proc., §585, subd. (b).) "The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint. *(In re Marriage of Lippel* [1990] 51 Cal.3d [1160,] 1166.)" (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868 (*Heidary*).)

This defect with the advisory verdict form does not itself compel amendment or reversal of the judgment, though, because of the trial court's remittitur, which reduced the amounts awarded to the amounts sought in the statements of damages. Since future economic loss was not a type of damages sought in the statements of damages, the final judgments did not include an award for such damages.

B. Duplicative emotional distress damages

The next flaw does impact the judgment. For the intentional infliction of emotional distress claim, the advisory jury awarded to each respondent $5 million for past and $15 million for future "mental suffering and physical pain." The jury separately awarded each respondent $17.5 million for "shame, mortification or hurt feelings" on their defamation claims. In the statements of damages, each respondent sought "emotional distress" damages, as well as separate damages for "shame, mortification, and hurt feelings." Because the final judgments conformed to the statements of damages, the judgments included the full amounts requested for "emotional distress" and "shame, mortification, and hurt feelings." But, by awarding separate amounts for these two items, the trial court improperly awarded duplicative damages.

"The range of mental or emotional injury subsumed within the rubric 'emotional distress' and for which damages are presently recoverable 'includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.' [Citation.]" (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 648-649.) The statements of damages' requests for "shame, mortification or hurt feelings" damages thus was subsumed within the requests for emotional distress damages, referred to as "mental suffering" in the verdict form.

Furthermore, there was no attempt, either at the default prove-up hearing or at the damages trial, to distinguish between (i) emotional distress/mental suffering and (ii) shame, mortification, or hurt feelings. "It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. That role requires the court to analyze the complaint for itself—with guidance from counsel if necessary—ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another. The court must then compare the properly pled damages for each defaulting party with the evidence offered in the prove-up." (*Heidary, supra*, 99 Cal.App.4th 857, 868.)

Respondents testified generally about the emotional distress they suffered, leaving no indication of how one sort of emotional distress may relate to the intentional infliction of emotional distress claim while another sort of emotional distress could relate to the defamation claim, or how their "mental suffering" differed from their "shame, mortification, or hurt feelings." "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159.) It is

clear from the record that respondents suffered emotional distress, but only a single award for this emotional distress was appropriate. The final judgments' awards of damages for both emotional distress and shame, mortification, and hurt feelings were duplicative and improper.

C. Absent proof of harm to reputation

The advisory verdict also awarded each respondent $17.5 million in damages for injury to reputation. The trial court subsequently reduced this amount to conform to the statements of damages; the amounts awarded ranged from $2.5 million to $12.5 million.

A statement which is libelous on its face—such as a statement falsely charging someone with having committed a crime or a statement tending to injure a person in his or her occupation—is libelous per se and actionable without proof of special damage. (Civ. Code, § 45a; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts § 541, p. 794.) A failure to prove special damages, however, is a factor in concluding that damages for injury to reputation are excessive. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1014.)

Each of the respondents testified to some degree or other how they had suffered in their career and how they worried that potential employers would discover Marciano's charges. But no respondent testified that he or she actually lost a verifiable business opportunity because of Marciano's actions.[9] Nor was any attempt made to prove the extent of respondents' reputation damages by showing how respondents' former potential earning capacity had been diminished because of Marciano's acts, or by some other method of quantifying actual reputation damages. In no way could the evidence possibly support the exorbitant reputation damages of $17.5 million awarded to each respondent by the advisory jury, or the still extraordinary amounts of $2.5 million to $12.5 million

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[9] The closest anyone came to providing such evidence was Choi's statement that her husband may never be able to obtain a senior pastor position. This testimony appears to have been merely speculative, however, and, in any event, Choi's husband was not a party to the lawsuit.

claimed in respondents' statements of damages and ultimately reflected in the final judgments.

Alleged income-related damages accruing from a defamatory statement must be supported by competent evidence showing that damages were suffered because of the statement. (See *Cunningham v. Simpson* (1969) 1 Cal.3d 301, 309.) Such evidence was entirely lacking here. Although respondents suspected that they may have been or could be damaged in their career because of Marciano's wild accusations, there was no proof of causation or damage.

There was also no evidence presented that would have allowed a trier of fact to quantify the amount of reputation damages suffered by respondents in any nonincome-related aspect. Therefore, as the final judgments are inclusive of reputation damages, they cannot stand in their present form.[10]

D. Remaining Emotional Distress Damages

When we account for the foregoing issues relating to damages (that future economic loss was not requested in respondents' statements of damages, that damages for shame, mortification, and hurt feelings were duplicative, and that damages accruing from harm to reputation were unproven), in terms of compensatory damages we are left with the advisory jury's award of $5 million for past mental suffering and physical pain and $15 million for future mental suffering and physical pain—$20 million total. Three respondents (Choi, Abat, and Fahs) requested more than this in their statements of damages for emotional distress; each requested $25 million. Meanwhile, Chapnick

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[10] Respondents only sought "general damages for injury to reputation," even though it appears that they could have also sought to recover presumed damages on their defamation claims. (See *Weller v. American Broadcasting Companies, Inc.*, *supra*, 232 Cal.App.3d 991, 1014.) That respondents did not seek presumed damages is apparent: respondents' statements of damages only specified "harm to reputation," the verdict forms only sought "general damages for injury to reputation," the judgments only referred to "general damages for injury to reputation," and no jury instruction was given—nor was any mention made at the damages trial—of how presumed damages may be awarded in a libel case.

requested $10 million for emotional distress, and Tagle requested $5 million for emotional distress.

Our role as the appellate court is to consider the evidence in the light most favorable to the judgment, drawing all reasonable inferences and resolving all conflicts in its favor. (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1074 .) We review the determination of damages by the trier of facts in a severely circumscribed manner. (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363.) "The law does not prescribe a definite standard or method to calculate compensation for pain and suffering; the jury merely is required to award an amount it finds reasonable in light of the evidence." (*Westphal*, at p. 1080.) Nevertheless, we may modify or vacate an award of damages where "the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court." (*Uva v. Evans*, at pp. 363-364.)

As the jury's verdicts were advisory, the amounts awarded in the final judgment were ultimately the trial court's responsibility. Nonetheless, it is clear from the record that the trial court relied on the advisory verdicts to a great extent. At the October 2, 2009, hearing, the trial court confirmed that the amounts ultimately awarded in the final judgments were being reduced simply to conform with the statements of damages, and that the court was "very comfortable with the amount of damages that the jury awarded." We therefore find it appropriate to consider whether the verdicts were the result of passion and prejudice, and whether the trial court neglected its role of "gatekeeper" in the default proceeding.

The Court of Appeal in *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267 recently reiterated the rule expressed in *Heidary*, that because a plaintiff in a default setting has no incentive to be conservative in its demands, the trial court must act as a "gatekeeper," making sure that only appropriate claims get through and comparing properly pled damages with the evidence presented. (*Kim*, at p. 272.)

We find that, by allowing respondents' counsel to inflame the jury, then by accepting the jury's verdicts without reservation and reducing the damages awards only to conform with the already (for the most part) enormous amounts requested in the statements of damages, the trial court did not adequately oversee the default process. The trial court relied too heavily on an advisory jury that rendered verdicts infected by passion and prejudice. Significant problems impacted the damages trial and the jury's verdicts. While Marciano's acts were highly reprehensible and clearly did cause respondents great emotional distress, our review of the entire record (viewing it in a light most favorable to the judgment) convinces us that the advisory verdicts were rendered as a result of passion and prejudice on the part of the jurors.

Respondents were essentially given free reign at the damages trial. Personal attacks on an opposing party constitute misconduct and may serve to inflame the passion and prejudice of the jury. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246.) Regardless, personal attacks against Marciano were commonplace. Counsel for Choi and Abat referred to Marciano as a "rattlesnake waiting to strike without conscience, without compunction and without remorse." The same attorney recounted vacations he had taken with his children to Arlington National Cemetery, and attempted to connect them to Marciano: "And one of the places we go is Arlington. And Arlington truly is a silent city. There's thousands and thousands of graves. It's a silent city. And if you were to ask those men and women why are you lying here, torn apart, your bodies ripped to shreds in some cases, why are you lying here? And they will say, I was protecting American justice, American freedom. It is something worth fighting for and dying for. And to see [Marciano] *come in here and piss on it*, is what he did this last week, is beyond anything I ever thought I would see in this house." (Italics added.) Counsel then exhorted the jury "to have the same courage and join [the lawyers] and the judge and the rest of us. Together we can fight this bully, and we can bring some sense of common decency into his life."

Respondents' counsel further made assertions about Marciano that had nothing to do with the case, including references to his drug use, his placement of a hidden camera

above his bed, and his purported enticement of young and beautiful au pairs from Europe for nefarious purposes. Moreover, Marciano's wealth was a subject that permeated the compensatory damages stage of the damages trial. While evidence of a defendant's wealth may in some cases be relevant, the amount of compensatory damages is normally to be determined without regard to the defendant's wealth. (*Hoffman v. Brandt* (1996) 65 Cal.2d 549, 553-554; *Las Palmas Associates v. Las Palmas Center Associates*, *supra*, 235 Cal.App.3d at pp. 1240-1244.) Here, Marciano's wealth was arguably relevant, because it related to his ability to continually harass respondents. Nevertheless, counsel's overemphasis of the subject likely served to inflame the jury as well, and caused them to award a very large amount of compensatory damages simply because Marciano is a very wealthy man. That the jury actually was inflamed is suggested by the fact that the advisory verdicts awarded more to respondents than even the exorbitant amounts requested by respondents' counsel in closing argument.

When evaluating the propriety of the trial court's award, we may consider awards rendered in similar cases. "While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508.) In their briefs, respondents do not reference any cases in which litigants suffering from emotional distress were awarded damages approaching the amounts awarded here. Marciano's briefs, however, reference a number of cases in which plaintiffs received significantly smaller emotional distress damages than those awarded to respondents. These cases include *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 ("The award of $662,000 for emotional distress is well within the range of awards in similar cases"), disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1060-1061 (award of $1.5 million for emotional distress damages to girl molested by her teacher and accused of fabricating the molestation); and *Smith v. City of Oakland* (N.D. Cal. 2008) 538 F.Supp.2d 1217, 1243 (finding emotional distress damages of $5 million "grossly excessive" and reducing amount to $3 million

awarded to man who was falsely arrested and charged based on planted evidence, and then incarcerated for 4 1/2 months, causing him to lose his house). We do not place great emphasis on these other cases, since each case must be evaluated on its own terms. However, the apparent absence of cases awarding emotional distress damages of the sort awarded to respondents gives some further weight to the conclusion that the awards here were excessive.

Another point that we find telling is that the emotional distress damages dwarfed the $5 million in punitive damages awarded to each respondent. "'In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 426.) As our Supreme Court found in *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, $1.3 million in compensatory damages awarded solely for physical and emotional distress "may have reflected the jury's indignation at [defendant's] conduct, thus including a punitive component." (*Id.* at p. 718; see also *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 90 [jury's award of $2.5 million for pain and suffering and loss of consortium high enough to have a punitive component].) Here, given the magnitude of the emotional distress damages, it can only be assumed that the jury primarily intended to punish Marciano by its award rather than compensate respondents. While it may be expected that emotional distress damages have a punitive component, in this case the jury (and in turn the trial court) appeared to confuse the function of compensatory damages with that of punitive damages. Since punitive damages were also awarded, allowing respondents to recover the amount of emotional distress damages determined by the advisory jury would result in an excessive double recovery.

Nevertheless, as discussed below in section VI. of this opinion, because respondents clearly suffered a great deal of emotional distress due to Marciano's odious behavior, a sizeable emotional distress award was appropriate.

V. Punitive Damages

Marciano next argues that the evidence presented relating to his financial condition was insufficient to justify an award of punitive damages. We find this argument unconvincing. To be sustained on appeal, an award of punitive damages must be supported by a trial record that contains meaningful evidence of the defendant's financial condition. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109.) The record here contains such evidence.

Marciano's former accountant, Gary Iskowitz, testified that Marciano's net worth could be greater than $306 million. In a letter written by Marciano and admitted into evidence, Marciano stated, "In the last ten years I made close to eight million dollars a year in income." At trial, Marciano testified that that respondents had stolen about $300 million from him, and possibly as much as $413 million. Choi, Marciano's longtime chief bookkeeper and office manager, testified that Marciano owned three mansions in Beverly Hills; owned commercial buildings in Beverly Hills, one of which he sold in 2005 for $135 million; and owned a Boeing 737 that cost at least $100,000 a month to maintain. Given the totality of the evidence relating to Marciano's wealth, the awards of $5 million in punitive damages to each of the respondents were not excessive.

VI. Conclusion

To summarize, we have determined that the punitive damages awards of $5 million to each respondent were appropriate and that substantial emotional distress awards (but less than the amount awarded by the advisory jury) were warranted. In determining a proper award for emotional distress, we keep in mind that our mission "is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1188.)

Because we have found that the compensatory damages award was excessive, we may either (1) order that a completely new trial be held, (2) order a new trial on the issue of damages only, or (3) reduce the amount of the awards and condition an affirmance of

the judgment as modified on respondents' consent to the reduced awards. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 310; *Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121.)

We conclude that the facts of this case support compensatory damages awards to each respondent of $5 million, in addition to the punitive damages awards of $5 million, and that such awards would cure any prejudice. While there is no precise method to determine the highest appropriate award, we believe that $5 million is an amount supported by several factors. First, as found by the trial court and the advisory jury, respondents clearly did suffer severe emotional distress. Five million dollars is a very sizable award, and appropriately compensates respondents for their suffering. Second, respondent Tagle, whose degree of emotional distress was at least equal to and possibly greater than that of other respondents, requested $5 million for emotional distress damages in her statement of damages, which (again) was a high, though not excessive, number. Third, the advisory jury awarded the same amount to each respondent for emotional distress damages, and the trial court indicated that it was "very comfortable" with the advisory jury's verdicts. Drawing from the determinations of the trier of facts, we find it appropriate to award each respondent the same amount of compensatory damages. Fourth, we find that $5 million compensatory damages awards are appropriate because they equal the amount of punitive damages awarded. With a compensatory award for emotional distress that contains a punitive element, a small ratio between compensatory damages and punitive damages, such as a one-to-one ratio, is appropriate. (See *Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 Cal.4th at p. 1189; *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, 538 U.S. at p. 245; *Roby v McKesson Corp.*, *supra*, 47 Cal.4th at p. 718.) A $5 million compensatory damages award results in a one-to-one ratio when compared with the $5 million punitive damages award. Given Marciano's conduct, such awards are appropriate.[11]

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11 Respondents acknowledge that they did not pursue their claims against BWP through the damages trial. The judgments reflect this fact by stating that respondents did not pursue their claims for attorney fees against BWP, but the judgments omit further

If respondents do not consent to the reduced awards, then only a new trial on damages will be necessary, since liability has been properly established. However, if there is a new trial, it will have to occur before a different judge. Code of Civil Procedure section 170.1, subdivision (c) states: "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." Given the trial court's unquestioning acceptance of the advisory jury's excessive verdicts and subsequent remittitur for the full amounts requested in respondents' statement of damages, the interests of justice direct that any further proceedings before Judge Elizabeth A. White would be inappropriate.[12]

DISPOSITION

The judgments are modified to state that each respondent's claims against Beverly Wilshire Properties, Inc., are dismissed with prejudice. The judgments are further modified to reduce the damages awarded against Georges Marciano and in favor of each respondent (Camille Abat, Steven Chapnick, Miriam Choi, Joseph Fahs, and Elizabeth Tagle) to $10 million each ($5 million in compensatory damages and $5 million in

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mention of BWP. We find that it is appropriate to modify the judgments to clarify that respondents' claims against BWP have been dismissed, as is stated in the disposition.

[12] Marciano's argument that Judge White exhibited bias that deprived him of a due process right to an impartial proceeding is not well taken. A judge may properly form opinions of a litigant based upon actual observation of the witnesses and evidence. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312; *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219-1220.) Marciano provided plenty of reasons (as shown by the evidence in addition to his own conduct during the case) for the trial court to find him not credible and apt to abuse the litigation process. The trial court's comment that Marciano "could be an eel" and "slip out from under us" when discussing his habit of disregarding deposition notices and court orders reflected nothing more than a comment on Marciano's litigation behavior. Marciano's claim that the comment evidences some sort of ingrained bias is completely specious.

punitive damages) and are affirmed as so modified, on the condition that respondents timely consent in writing to such a reduction in accordance with California Rules of Court, rule 8.264(d). If consent is not filed within the time allowed, judgment for any party not filing consent is reversed as to the amount of damages only, and the matter is remanded for a new trial to determine the amount of damages, liability having been established. Following remittitur, the Presiding Judge of the Los Angeles Superior Court shall assign the case to a different trial judge for any further proceedings. (Code Civ. Proc., § 170.1, subd. (c).)

The orders granting respondents monetary sanctions are affirmed, as are the orders granting terminating sanctions in favor of respondents. The entry of default is undisturbed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.